BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

RECONSIDERATION OF PRIOR BOARD OF CONTROL DECISION ON: Statutes 1980, Chapter 1143 Claim No. 3929 Directed by Statutes 2004, Chapter 227, Sections 109-110 (Sen. Bill No. 1102), Effective August 16, 2004.	Case No.: 04-RL-3929-05 ***Regional Housing Needs Determination-Councils of Governments*** NOTICE OF COMMENT PERIOD ON DRAFT STAFF ANALYSIS HEARING DATE: March 30, 2005

TO: League of California Cities
California State Association of Counties
Councils of Governments
Department of Finance
State Controller's Office
Director, Department of Housing and Community Development
Legislative Analyst
Interested Parties and Legislative Committees

Notice of Comment Period on Draft Staff Analysis

The draft staff analysis and supporting documentation is being posted to the Commission's website: http://www.csm.ca.gov/reconsiderations/rhndcogs.htm.

Interested parties, affected state agencies, and interested persons are invited to file comments with the Commission on the draft staff analysis by **February 17, 2005**.

An original and one copy or an original and a .pdf file shall be submitted to the Commission. The pdf file should be emailed to csminfo@csm.ca.gov. The mailing list will be notified when comments are posted on the Commission's website. This will satisfy all the service requirements under California Code of Regulations, title 2, section 1181.2.

Comments on the draft staff analysis must comply with the following requirements:

- Assertions or representations must be supported by documentary evidence and must be authenticated by declarations under penalty of perjury signed by persons who are authorized and competent to do so and must be based upon the declarant's personal knowledge or information or belief.
- If the comments cite to federal or state laws, regulations, executive orders, or court decisions, copies of those documents must be included in the filing. Court decisions

that involve the Board of Control or the Commission on State Mandates are exempt from this requirement.

Commission Hearing – March 30, 2005[1]

The Commission will hear and determine this reconsideration and may adopt the proposed revised statement of decision on March 30, 2005. If a decision is not adopted in March, the proposed revised statement of decision will be set for adoption at the May 26, 2005 hearing.

With the exception of section 1188.4 of the Commission's regulations, the hearing procedures in article 7 of the Commission's regulations in effect at the time of the hearing will apply. Since this reconsideration was not requested pursuant to Government Code section 17559, the hearing procedures set forth in section 1188.4 do not apply in this case.

Representatives of interested parties and affected state agencies and the Legislature will be asked to notify the Commission staff if they wish to testify. Time limits may be imposed if necessary.

A final staff analysis on the reconsideration will be issued and posted to the Commission's website on or about March 10, 2005.

Parameters and Guidelines

The Commission, if necessary, shall revise its parameters and guidelines to be consistent with this reconsideration. Any changes by the Commission shall be deemed effective July 1, 2004.[2] A prehearing conference may be scheduled if requested by any party. See sections 1183.04 and 1187.4 of the Commission's regulations.

If you have any questions regarding this matter, please contact Nancy Patton, Assistant Executive Director at (916) 323-8217.

Dated: January 20, 2005

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PAULA HIGASHI, Executive Director

[1] The hearing date was changed to March 30 because the 31st is a state holiday.

[2] See Statutes 2004, chapter 227, section 110.

Hearing Date: March 30, 2005
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ITEM ___

RECONSIDERATION OF PRIOR STATEMENT OF DECISION DRAFT STAFF ANALYSIS

Government Code Sections 65302, subdivision (c), and Sections 65580 – 65589;
Statutes 1980, Chapter 1143 (Assem. Bill No. 2853)

Board of Control Decision No. 3929

Regional Housing Needs Determination: Councils of Governments
(04-RL-3929-05)

Reconsideration Directed by Statutes 2004, Chapter 227, Sections 109 and 110
(Sen. Bill No. 1102)

EXECUTIVE SUMMARY

Statutes 2004, chapter 227 (Sen. Bill No. 1102, effective Aug. 16, 2004) directs the Commission on State Mandates to reconsider the Board of Control's 1981 final decision and, if necessary, revise the parameters and guidelines of the *Regional Housing Needs* program. The Board of Control determined that Statutes 1980, chapter 1143 imposes a reimbursable mandate on councils of governments for the regional housing needs assessments that they perform for cities and counties within their regions. The Board of Control adopted parameters and guidelines in 1981 to reimburse specified activities.

Comments on the reconsideration, as summarized in the analysis, were received from the Department of Finance, Senator Ducheny, the League of California Cities, the California Association of Councils of Governments, the Sacramento Area Council of Governments, the San Diego Association of Governments, the Southern California Association of Governments, the California State Association of Counties, and the California Building Industry Association.

For reasons stated in the analysis, staff finds that (1) it has jurisdiction to reconsider Board of Control Decision No. 3929, and that the reconsideration decision is effective as of July 1, 2004; (2) councils of governments are not eligible claimants for purposes of mandate reimbursement under article XIII B, section 6; and as an alternative grounds for denial, (3) the test claim legislation does not impose "costs mandated by the state" on councils of governments within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17556 because of the councils' fee authority found in Government Code section 65584.1.

Recommendation

Therefore, staff recommends that the Commission adopt this analysis and deny claim no. 3929 effective July 1, 2004.

STAFF ANALYSIS

Chronology

07/22/81 Test Claim filed by the Association of Bay Area Governments

08/19/81 Board of Control determines that Statutes 1980, chapter 1143 imposes a reimbursable mandate for claim no. 3929

10/12/81 Board of Control adopts parameters and guidelines

12/16/81 Board of Control amends parameters and guidelines

01/20/82 Board of Control adopts statewide cost estimate

10/25/84 Board of Control amends parameters and guidelines

08/16/04 Legislature enacts Statutes 2004, chapter 227, requiring the Commission on State Mandates ("Commission") to reconsider the Board of Control Decision No. 3929

11/03/04 Commission issues Notice of Reconsideration, Briefing and Hearing Schedule

11/19/04 Senator Ducheny submits comments

11/30/04 Department of Finance submits comments

12/01/04 League of California Cities ("LCC") submits comments

12/01/04 California Association of Councils of Governments ("CACOG") submits comments

12/01/04 Sacramento Area Council of Governments ("SACOG") submits comments

12/01/04 San Diego Council of Governments ("SANDAG") submits comments

12/01/04 Southern California Association of Governments ("SCAG") submits comments

12/22/04 SCAG requests extension of time to file rebuttal comments

12/23/04 California State Association of Counties ("CSAC") submits comments

12/23/04 Commission issues Notice of Reconsideration, Briefing and Hearing Schedule as amended on 12/23/04

12/30/04 California Building Industry Association (CBIA) submits comments

01/10/05 SCAG, SACOG, ABAG, CACOG, and SANDAG submit rebuttal comments

01/20/05 Commission issues draft staff analysis

Background

Statutes 2004, chapter 227 (Sen. Bill No. 1102, effective Aug. 16, 2004) directs the Commission to reconsider the Board of Control's prior final decision and parameters and guidelines on the *Regional Housing Needs* program. Sections 109 and 110 of the bill state the following:

> Notwithstanding any other provision of law, the Commission on State Mandates shall reconsider former State Board of Control decisions 3916, 3759, 3760,[1] and 3929 regarding the regional housing needs mandate enacted by Chapter 1143 of the Statutes of 1980 to determine whether the statute is a reimbursable mandate under Section 6 of Article XIII B of the California Constitution in light of federal and state statutes enacted and federal and state court decisions rendered since this statute was enacted, including the existence of fee authority pursuant to Section 65584.1[2] of the Government Code. The commission, if necessary, shall revise its parameters and guidelines to be consistent with this reconsideration.
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> Any changes by the commission shall be deemed effective July 1, 2004.
>
> The Commission on State Mandates shall amend the appropriate parameters and guidelines, and the Controller shall revise the appropriate reimbursement claiming instructions to be consistent with this act.

Board of Control Decision

In 1981, the Board of Control determined that Statutes 1980, chapter 1143 imposes a reimbursable mandate for claim no. 3929 (filed by the Association of Bay Area Governments, or "ABAG"). The test claim legislation enacted content requirements for housing elements that cities and counties are required to adopt as part of their general plans.[3] For example, section 65583[4] of the test claim legislation requires the housing element to contain an assessment of housing needs and inventory of resources and constraints relevant to meeting those needs, including detailed content as specified.[5] The housing element is also required to include "A statement of the community's goals, quantified objectives, and policies relative to the

[1] The reconsideration for these claims is in a separate analysis entitled *Regional Housing Needs Assessments: Cities and Counties.*

[2] Government Code section 65584.1 (added by Stats. 2004, ch. 227) reads:

> Councils of government may charge a fee to local governments to cover the projected reasonable, actual costs of the council in distributing regional housing needs pursuant to this article. Any fee shall not exceed the estimated amount required to implement its obligations pursuant to Section 65584. A city, county, or city and county may charge a fee, not to exceed the amount charged in the aggregate to the city, county, or city and county by the council of governments, to reimburse it for the cost of the fee charged by the council of government to cover the council's actual costs in distributing regional housing needs. The legislative body of the city, county, or city and county shall impose the fee pursuant to Section 66016, except that if the fee creates revenue in excess of actual costs, those revenues shall be refunded to the payers of the fee.

[3] Government Code section 65350.

[4] All statutory references are to the Government Code unless otherwise indicated.

[5] Government Code section 65583, subdivision (a).

maintenance, improvement, and development of housing."[6] A five-year program for implementation is also required, with content outlined in detail.[7]

The test claim statute defines the locality's share of the regional housing need, and requires the Department of Housing and Community Development ("HCD") or the applicable council of government ("COG") to determine the existing and projected housing needs for its region, and to determine each locality's share of the housing need.[8] After the COG determines the housing needs for each locality within its region, a county or city may revise the definition of its share based on available data. The COG is then required to accept the revision or indicate, based on available data and accepted planning methodology, why the revision is inconsistent with the regional housing need.[9]

Although the housing element requirement in the general plan dates to 1967 (Stats. 1967, ch. 1658), the Legislature did not enact detailed content requirements until the test claim statute in 1980. Also, the HCD had enacted regulations or guidelines for housing elements,[10] but these were not mandatory for cities or counties.[11]

The Board of Control adopted parameters and guidelines for the test claim statute in October 1981. As stated in the parameters and guidelines:

> By enacting Chapter 1143, Statutes of 1980, the Legislature required that each council of government (COG) determine the existing and projected need for housing for its region, and determine each City and County share of such need, based upon these factors:
>
> -Market demand for housing
> -Employment opportunities
> -Availability of Suitable [sic] sites and public facilities
> -Commuting patterns
> -Type and tenure of housing
> -Housing needs of farmworkers
> -Desire to avoid impaction of localities with relatively high proportions of lower income households
>
> If a local government revises its share of regional housing needs determined by each COG, the COG shall accept the revision, or shall indicate, based upon

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[6] Former Government Code section 65584, subdivision (b). This was later amended to add "preservation."

[7] Former Government Code section 65584, subdivision (c).

[8] Former Government Code section 65584, subdivision (a).

[9] Former Government Code section 65584, subdivision (c).

[10] The housing element guidelines were repealed in 1982. See California Code of Regulations, title 24, chapter 6, subchapters 3 and 4.

[11] Government Code section 65585, subdivision (a); *Stevens v. City of Glendale* (1981) 125 Cal.App.3d 986, 997; *Bownds v. City of Glendale* (1980) 113 Cal.App.3d 875, 885-886.

available data and accepted planning methodology, why the revision is inconsistent with the regional housing need.

Under the heading "Reimbursable Costs," the parameters and guidelines outline the following activities (omitted paragraphs are those labeled "reimbursable costs"):

1. Activity: If necessary, adjust data provided by [HCD] to determine existing and projected housing needs of the region. Coordination of COG determinations of regional housing needs should take place with [HCD]. [¶]…[¶]
2. Activity: Preparation of draft plan that distributed regional housing needs to cities and counties within the geographical area of the COG, utilizing available data and the factors cited in section 65584 (a). [¶]…[¶]
3. Activity: Conducting of public hearings by the Board of Directors for the purpose of adopting determinations of local shares of regional housing needs. Meetings, briefing, training sessions, seminars and advisory committees are not reimbursable. [¶]…[¶]
4. Activity: Review of all local government revisions to the COG's determined shares of regional housing needs, if any, and acceptance of such revisions or indications that such revisions are inconsistent with regional housing needs within 60 days of local government's revisions. [¶]…[¶]
5. [This paragraph specifies costs incurred by specified COGs (e.g., SCAG) within specified deadlines for revisions. The Ps&Gs also included some express limitations on reimbursement.]

State Agency Position

In comments received November 30, 2004, the Department of Finance ("DOF") states COGs are not eligible claimants under article XIII B, section 6 of the California Constitution because they have no independent power of taxation, nor do the fees they receive from cities and counties constitute "proceeds of taxes" subject to article XIII B appropriation limits. According to DOF, COGs are analogous to redevelopment agencies that were found ineligible for state reimbursement under two cases: *Redevelopment Agency of the City of San Marcos v. Commission on State Mandates* (1997) 55 Cal. App. 4th 976, and *City of El Monte v. Commission on State Mandates* (2000) 83 Cal.App.4th 266. In those cases, the redevelopment agencies were ineligible for state reimbursement because their financing was not "deemed the receipt of by an agency of proceeds of taxes … within the meaning of Article XIII B of the California Constitution …." DOF states that COGs are organized pursuant to the Joint Powers Act (Gov. Code, § 6500 et seq.) and have no ability to levy taxes, and therefore, are not eligible claimants. DOF also argues that COGs have fee authority under section 65584.1, so the Commission cannot find there are costs mandated by the state. DOF asserts that funds in past budgets appropriated and paid to COGs for this program "should be considered a voluntary state subvention, not required by mandate law."

No other state agency submitted comments on this reconsideration.

Interested Party Positions

Senator Ducheny: In comments received November 19, 2004, Senator Ducheny states that given budget deficits, it is not realistic to expect ongoing General Fund appropriations for the regional housing needs determinations process. Senator Ducheny also states that *Redevelopment Agency of the City of San Marcos v. Commission on State Mandates, et al.* (1996) 43 Cal. App. 4th 1188, and *Redevelopment Agency v. Commission on State Mandates* (1997) 55 Cal.App. 4th 976, make COGs ineligible for reimbursement. She also notes that the Legislature provided fee authority to COGs in section 65584.1 for the activities in the test claim statute, "and for local governments to in turn to pass these costs on to developers as fees." According to the Senator, this fee authority was intended to meet the requirement in section 17556, subdivision (d), concluding that while there is a mandate on COGs "to perform the distribution of the regional housing need," it is not a reimbursable mandate.

California Association of Councils of Governments: CACOG's position is that the original Board of Control decision should remain in effect without change. CACOG states that the cases cited by Senator Ducheny concern redevelopment agencies and not COGs, so they do not directly decide the issue. Also, CACOG asserts that redevelopment agencies are created pursuant to specific state laws, whereas COGs are joint powers agencies with no dedicated state revenues and no taxing authority. CACOG asserts that court decisions have stated that redevelopment agencies are agencies of the state and not a local government, although governed by local officials, and their activities carry out a state function. COGs (except ABAG) also carry out state functions in transportation, with state funding. CACOG argues, "It would be a different issue were the Commission to be considering a responsibility that is imposed upon entities that are Councils of Governments for activities they are carrying out as a transportation planning agency or transportation commission which includes state funding." CACOG argues that there is a difference between activities a city carries out as a redevelopment agency for which it is not eligible for reimbursement, and those it carries out as a city for which it is. As to COG's fee authority, CACOG argues that applying it would violate the state and federal constitutional provision against impairment of contracts because the joint powers agreements between COGs and member cities/counties are contracts that contain the only terms for amending them. CACOG reiterates the League of California Cities' (LCC) position that a COG fee on a local government that is not used for a local purpose, but for a statewide purpose, is actually a tax and therefore invalid.

Sacramento Area Council of Governments: SACOG urges the Commission to find that the regional housing needs assessments continue to be reimbursable. SACOG concurs with and incorporates CACOG's and LCC's comments. SACOG asserts that section 65584.1 does not grant legitimate fee authority and does not exempt regional housing needs assessments from reimbursement. Because COGs have only the powers enumerated in their fee agreements with member agencies, COGs have no power to levy fees because member agencies would have to amend their joint powers agreements to grant COGs this authority. The fee authority, according to SACOG, is not real authority because it cannot be exercised until the member agencies authorize it. Moreover, SACOG points out that if the joint powers agreements were amended to include a fee, some member agencies may withdraw from the COG, in which case the housing needs assessments would need to be conducted by the state. HCD may delegate this to the local agency if it has the resources and capability, and the local agency agrees to prepare the

assessment. Under the new fee statute, COGs can only request that local agencies be subject to the new fee, and cities and counties likely do not have fee authority. SACOG asserts, "Government Code section 65584.1 hinges on the hope that local agencies, and in turn, developers, will agree to pay the costs of the regional housing needs determination, despite the lack of genuine authority to levy such fees."

San Diego Association of Governments: SANDAG supports the comments submitted by CACOG, and states that COGs are eligible claimants. In support, SANDAG cites the Board of Control decision and the State Controller's Mandated Cost Manual.

Southern California Association of Governments: In its comments filed December 1, 2004, SCAG argues that the state is required to reimburse local governments for the cost of implementing the regional planning mandate. SCAG asserts that whether COGs may actually impose the fee in section 65584.1 is an unresolved issue and that, until resolved, it is premature for the Commission to determine section 65584.1's effect on the reimbursability of the regional housing needs assessment process. SCAG also states that the COG's authority to collect fees amounts to COGs collecting from themselves. "Collecting from their [COGs'] members hardly results in any sort of reimbursement to the COGs." So COGs, according to SCAG, would be paying for the regional housing needs assessments themselves. SCAG asserts that this runs counter to the SB 90 policy to prevent the state from shifting costs of providing public services to local agencies.

SCAG states that pursuant to section 65584, it must allocate shares of regional housing need to cities and counties in the region, and allocate shares of subregional housing need to subregional agencies that choose to accept the delegation of responsibility from SCAG. As to the question of whether COGs are eligible claimants, SCAG submits that they are and cites the Board of Control decision and the State Controller's Mandated Cost Manual in support. SCAG asserts that since Revenue and Taxation Code section 2211 has not changed, COGs are still eligible claimants. As to the issue of whether the test claim statute imposed a new program, SCAG argues that it did. Before the test claim statute, COGs were not required to determine a regional housing need, nor to determine local shares of the need. Despite amendments to section 65584 since the test claim statute, it continues to mandate COGs to perform these activities, and is therefore still a new program. As to the new fee authority of 65584.1, SCAG asserts that its validity is unresolved, and repeats the League of California Cities' assertion that the fee constitutes an unconstitutional local tax. SCAG also argues that such a fee to member agencies would essentially be charging themselves in violation of the principle not to shift costs for public services to local agencies. SCAG states that in light of past reimbursement by the state for this program, the new fee authority should have no bearing on state reimbursement. Finally, SCAG states that according to the 2003-2004, and 2002-2003 state budget acts, only $1000 has been appropriated for reimbursements to local agencies for the test claim activities.

SCAG (along with ABAG, SACOG, CACOG, and SANDAG) submitted rebuttal comments on January 10, 2005, taking issue with the argument that the fee authority of section 65584.1 precludes COG reimbursement. COGs are joint powers agencies made up of cities and counties that voluntarily become members. Thus, they argue that COGs charging member agencies would amount to COGs effectively paying for the activities themselves, which would run counter to the policy of the state not shifting the cost of public services to local agencies. They also argue that COGs have no authority to assess fees on their members unless their joint powers

agreements empower them to, but that none of the agreements do. Thus, without amending their agreements, COGs have no authority to impose fees on their members. They argue that to force COGs to assess fee authority would unconstitutionally interfere with their agreements (Cal. Const. art. I, § 9). They also argue that the regional housing needs assessment is a state program created to address the shortage of affordable housing in California, and the state (via HCD) does the assessments for regions without COGs. Because this demonstrates the state rather than the local interest in housing assessments, they argue that it is "contrary to the policies underlying SB 90 to force local agencies to shoulder the costs of this state service." As to the redevelopment agency cases, they assert that COGs do not receive revenue from tax increment (which are defined to not constitute the proceeds of taxes), so they are different from redevelopment agencies. Finally, they argue that even if COGs have fee authority, the cities and counties cannot pass the fees onto developers because they do not have authority to levy fees to offset costs incurred by other agencies such as COGs. Rather, the fee authority only pertains to offset costs incurred by the city or county's own planning agency. Also, since the regional housing needs assessment does not provide a direct benefit to developers, the reasonable cost of providing the service would be difficult or impossible to determine. They argue that there is no reason to deviate from the past practice of reimbursing COGs, since neither the state's nor the COG's obligations have changed.

League of California Cities: LCC argues that Statutes 1980, chapter 1183 has not changed and continues to impose a new program or higher level of service on cities and counties, and disagrees with Senator Ducheny that the original parameters and guidelines were in error. LCC states that local governments have been allowed to seek reimbursement for review of the allocation data provided by COGs or HCD regarding the share of regional housing needs to determine whether the data is a fair reflection of its share of the region's housing needs. Although LCC admits the statute does not require it, it contends that the review or appeal is part of the process for the locality receiving its fair share of the regional housing needs. According to LCC, "A local government's fair share of regional housing needs is the foundation of the housing element. Preparation of the housing element is a mandate imposed by the statute. Review of regional fair share numbers is an essential step in the preparation of the housing element and, therefore, a reimbursable activity."

LCC further comments that COGs are eligible claimants because article XIIIB, section 6 requires reimbursement to a "local agency," meaning "any city, county, special district, authority, or other political subdivision of the state." (Gov. Code, § 17518). As a "joint powers authority," which is a public entity separate and distinct from the parties that created the authority, a COG is an "authority" within the meaning of section 17518. LCC disagrees with Senator Ducheny's reference to two cases for the proposition that a COG may not submit a claim for reimbursement. According to LCC, these cases did not hold that a COG may not submit a claim for reimbursement, but only that a redevelopment agency may not submit one.

LCC asserts that section 65584.1 provides neither the COGs nor cities and counties with valid authority to impose fees for the distribution of regional housing needs. As to COGs charging a fee to cities and counties to cover costs to distribute regional housing needs, LCC states that "the statute unconstitutionally interferes with the organic structure of these councils of governments." COGs are joint powers authorities formed pursuant to section 6500 et seq., with a constitution or charter that sets out its powers and limitations. Because COGs exist pursuant to a joint powers

agreement between them and their cities and counties, with some of the agreements containing fee authority and others not, LCC argues that the fee authority statute violates the state constitution when the agreement does not authorize the imposition of fees. LCC states that assuming there is COG fee authority, section 65584.1 purports to authorize the city or county to impose a fee on developers to reimburse itself for the COG fee. Section 65584.1 requires the fee to be imposed pursuant to section 66106, which limits the fee to the estimated cost of providing the service. However, the city or county is not providing the service to the developer, nor did the city or county incur costs to distribute regional housing needs. Since the COG provided the service and incurred the cost, LCC argues that the pass through fee is a tax that requires voter approval.

Finally, LCC notes that developer fees increase the cost of housing, arguing that it is "highly ironic for the state to encourage a city … or county to impose a fee on a housing developer to pay for the preparation of a housing element which has, as its objective, providing for the local government's fair share of the regional housing need for all income levels."

California State Association of Counties: CSAC, in a December 23, 2004 letter, states that it concurs with the LCC comments.

California Building Industry Association: CBIA, in comments received December 30, 2004, submits that section 65584.1 (fee authority) should not be given weight by the Commission in conducting its review. CBIA asserts that 65584.1 "not serve as a new argument in support of any attempt to foist these state-mandated costs, which are ostensibly for the benefit of State and regional communities as a whole, onto that fraction of the community which may be involved in building and buying new homes." CBIA argues that allowing costs of state-mandated regional planning to promote housing to be passed onto cities and counties, and from there to homebuilders, would further exacerbate the difficulties of providing affordable housing. CBIA states that fees and exactions on residential development help drive up the cost of housing in California, and cited a HCD study that noted problems with residential development fees. CBIA argues that section 65584.1 does not provide authority for COGs to pass on their state-mandated costs to homebuilders or homebuyers by way of city or county fees. According to CBIA, COGs that use section 65584.1 would impair or interfere with their joint powers agreements in violation of article I, section 9 (the contracts clause) of the California constitution. CBIA also argues that even if a COG implemented this new fee authority, the statute provides no guidance on how it could be lawfully implemented, which would be magnified if cities or counties attempted to pass on their costs to developers.

CBIA asserts that the fee statute does not provide a valid basis for cities and counties to pass through costs they may incur for the support of the housing needs work performed by the COGs, and would not provide a basis for a valid fee for several reasons. First, there is no basis for seeking reimbursement of costs incurred by other agencies. City/county fee authority is limited to the reasonable costs imposed on the city or county. There is no authority "to impose fees on private property owners or developers to 'reimburse' costs incurred by others." Second, article XIII D of the California Constitution prohibits imposing a fee for general governmental services (art. XIII D, § 6, subd. (b)(5)). The fee prohibition applies to services available to the public at large in substantially the same manner as property owners. Because the service provided by COGs in distributing regional housing needs is available to the community on an equal basis, and "regional housing is a matter of statewide concern," charging a fee for it is constitutionally

prohibited. Also prohibited is a fee on property owners unless the service is actually used by, or immediately available to them (art. XIII D, § 6, subd. (b)(4)). The fee cannot be based on potential or future use of a service. Thus, any city/county fee for housing elements would actually be a tax requiring voter approval. Third, the fee authorized by section 65584.1 would not meet the criteria for the two types of fees recognized by the California Supreme Court: development and regulatory fees. A development fee is defined "for the purpose of defraying all or a portion of the cost of public facilities related to the development project." (Gov. Code, § 66000, subd. (b)). The planning costs in section 65584.1's fee do not defray costs of public facilities, nor do they defray impacts caused by particular development projects, as required by law, and therefore do not constitute a lawful development fee. Since housing element activities are incurred independent of any particular development project, regardless of the level of development, and even in its absence, development fees imposed for housing element activities would be unlawful. Regulatory fees, according to CBIA, would also not apply to this case because they cannot exceed the reasonable cost of providing the service or regulatory activity for which they are charged, and they cannot be levied for general revenue purposes. If revenue is the primary purpose of the regulatory fee, and regulation is merely incidental, the fee would actually be a tax. CBIA argues that there is no regulatory function for this fee, as COGs have no role regulating individual housing development projects. Rather, the intent is to raise revenue to free the state from reimbursing the state-mandated program. Finally, CBIA argues that there is no nexus between new residential development projects and the COG's costs incurred in helping develop the housing element. Conditions on development not related to the use of the property, but to shift the burden of providing the costs of a public benefit to another not responsible or only remotely or speculatively benefiting from it, is an unreasonable exercise of the police power, according to case law cited by CBIA. It also asserts that there must be a reasonable nexus between development activity and exactions imposed as a condition of that activity.

Discussion

The courts have found that article XIII B, section 6 of the California Constitution[12] recognizes the state constitutional restrictions on the powers of local government to tax and spend.[13] "Its purpose is to preclude the state from shifting financial responsibility for carrying out

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[12] Article XIII B, section 6, subdivision (a), (as amended by Proposition 1A in November 2004) provides:

> (a) Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the State shall provide a subvention of funds to reimburse that local government for the costs of the program or increased level of service, except that the Legislature may, but need not, provide a subvention of funds for the following mandates: (1) Legislative mandates requested by the local agency affected. (2) Legislation defining a new crime or changing an existing definition of a crime. (3) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975."

[13] *Department of Finance v. Commission on State Mandates (Kern High School Dist.)* (2003) 30 Cal.4th 727, 735.

governmental functions to local agencies, which are 'ill equipped' to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose."[14] A test claim statute or executive order may impose a reimbursable state-mandated program if it orders or commands a local agency or school district to engage in an activity or task.[15]

In addition, the required activity or task must be new, constituting a "new program," or it must create a "higher level of service" over the previously required level of service.[16]

The courts have defined a "program" subject to article XIII B, section 6, of the California Constitution, as one that carries out the governmental function of providing public services, or a law that imposes unique requirements on local agencies or school districts to implement a state policy, but does not apply generally to all residents and entities in the state.[17] To determine if the program is new or imposes a higher level of service, the test claim legislation must be compared with the legal requirements in effect immediately before the enactment of the test claim legislation.[18] A "higher level of service" occurs when the new "requirements were intended to provide an enhanced service to the public."[19]

Finally, the newly required activity or increased level of service must impose costs mandated by the state.[20] -

The Commission is vested with exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6.[21] In making its decisions, the Commission must strictly construe article XIII B, section 6 and not apply it as an

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[14] *County of San Diego v. State of California (County of San Diego)*(1997) 15 Cal.4th 68, 81.

[15] *Long Beach Unified School Dist. v. State of California* (1990) 225 Cal.App.3d 155, 174.

[16] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 878 (*San Diego Unified School Dist.)*; *Lucia Mar Unified School District v. Honig* (1988) 44 Cal.3d 830, 835-836 (*Lucia Mar*).

[17] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 874, (reaffirming the test set out in *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56; *Lucia Mar, supra,* 44 Cal.3d 830, 835.)

[18] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 878; *Lucia Mar, supra,* 44 Cal.3d 830, 835.

[19] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 878.

[20] *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487; *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1265, 1284 (*County of Sonoma*); Government Code sections 17514 and 17556.

[21] *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 331-334; Government Code sections 17551, 17552.

"equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities."[22]

I. What is the scope of the Commission's jurisdiction directed by Senate Bill 1102?

Statutes 2004, chapter 227, sections 109-110 (Sen. Bill No. 1102, eff. Aug. 16, 2004), requires the Commission on State Mandates, "notwithstanding any other provision of law" to "reconsider former State Board of Control decisions 3916, 3759, 3760, and 3929 regarding the regional housing needs mandate enacted by Chapter 1143 of the Statutes of 1980 to determine whether the statute is a reimbursable mandate under Section 6 of Article XIII B of the California Constitution … ."[23]

Administrative agencies, such as the Commission, are entities of limited jurisdiction that have only the powers that have been conferred on them, expressly or by implication, by statute or constitution.[24] An administrative agency may not substitute its judgment for that of the Legislature. When an administrative agency acts in excess of the powers conferred upon it by statute or constitution, its action is void.[25]

The Commission was created by the Legislature (Gov. Code, §§ 17500 et seq.), and its powers are limited to those authorized by statute. Section 17551 requires the Commission to hear and decide upon a claim by a local agency or school district that the local agency or school district is entitled to reimbursement pursuant to article XIII B, section 6 of the California Constitution. Section 17521 defines the test claim as "the first claim, including claims joined or consolidated with the first claim, filed with the Commission alleging that a particular statute or executive order imposes costs mandated by the state."

Thus, the Government Code gives the Commission jurisdiction only over those statutes and/or executive orders pled by the claimant in the test claim. The Commission does not have the authority to approve a claim for reimbursement on statutes or executive orders that have not been pled by the claimant. For this reason, this analysis does not apply to amendments to the test claim statutes subsequent to Statutes 1980, chapter 1143.[26]

Furthermore, section 17559 grants the Commission the authority to reconsider prior final decisions only within 30 days after the statement of decision is issued. But in the present case, the Commission's jurisdiction is based solely on Senate Bill No. 1102. Absent Senate Bill No. 1102, the Commission would have no jurisdiction to reconsider any of its decisions relating

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[22] *County of Sonoma, supra,* 84 Cal.App.4th 1265, 1280, citing *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1817.

[23] Statutes 2004, chapter 227, section 109.

[24] *Ferdig v. State Personnel Board* (1969) 71 Cal.2d 96, 103-104.

[25] *Ibid.*

[26] Section 65584, the test claim statute that applies to COGs, has been amended by Statutes 1984, chapter 1684, Statutes 1989, chapter 1451, Statutes 1990, chapter 1441, Statutes 1998, chapter 796, Statutes 2001, chapter 159, Statutes 2003, chapter 760, and Statutes 2004, chapter 696. The 2004 statute repealed and replaced section 65584.

to housing element provisions of the Government Code since the decisions on those statutes were adopted and issued well over 30 days ago.

Thus, the Commission must act within the jurisdiction granted by Senate Bill No. 1102, and may not substitute its judgment regarding the scope of its jurisdiction on reconsideration for that of the Legislature.[27] Since an action by the Commission is void if its action is in excess of the powers conferred by statute, the Commission must narrowly construe the provisions of Senate Bill No. 1102.

The parameters and guidelines for the *Regional Housing Needs* program were originally adopted in 1981, with a reimbursement period beginning January 1, 1981. Senate Bill 1102 (Stats. 2004, ch. 227) directs the Commission to reconsider Board of Control test claims relating regional housing. Section 109 of the bill states "[a]ny changes by the commission shall be deemed effective July 1, 2004."

Therefore, based on the plain language of Senate Bill 1102 (Stats. 2004, ch. 227, § 109), staff finds that the period of reimbursement for the Commission's decision on reconsideration begins July 1, 2004.

II. Are COGs eligible claimants under article XIII B, section 6 of the California Constitution?

Section 65584, as added by Statutes 1980, chapter 1143, requires each COG to determine the existing and projected housing needs for its region, and to determine each locality's share of the housing need.[28] After the COG determines the housing needs for each locality within its region, a county or city may revise the definition of its share based on available data. The COG is then required to accept the revision or indicate, based on available data and accepted planning methodology, why the revision is inconsistent with the regional housing need.[29]

As indicated above, the Board of Control determined in 1981 that section 65584 of the test claim legislation imposed a reimbursable state-mandated program under article XIII B, section 6 on COGs. For purposes of this reconsideration, several COGs urge the Commission to continue to find that they are eligible claimants and are entitled to reimbursement under article XIII B, section 6 for the costs listed in the parameters and guidelines to implement section 65584.[30]

For the reasons provided below, however, staff finds that the Board of Control's decision is legally incorrect. Based on the courts' interpretation of article XIII B, section 6, staff finds that the "costs" incurred by COGs are not the type of costs that are reimbursable under article XIII B, section 6. Thus, COGs are not eligible claimants for purposes of mandate reimbursement under article XIII B, section 6 or section 17500 et seq.

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[27] *California State Restaurant Assn. v. Whitlow* (1976) 58 Cal.App.3d 340, 346-347.

[28] Former Government Code section 65584, subdivision (a).

[29] Former Government Code section 65584, subdivision (c).

[30] See comments from CACOG, SACOG, SANDAG, and SCAG.

The California Supreme Court has repeatedly held that the subvention requirement of article XIII B, section 6 must be interpreted in light of its textual and historical context.[31] Thus, before describing COGs, it is necessary to outline the history and purpose of mandate reimbursement under the California Constitution.

In 1978, the voters adopted Proposition 13, which added article XIII A to the California Constitution. Article XIII A imposes a limit on the power of state and local governments to adopt and levy taxes. In 1979, the voters added article XIII B to the Constitution, which "imposes a complementary limit on the rate of growth in government spending."[32] The spending limit in article XIII B is accomplished by limiting the "total annual appropriations subject to limitation" so that "a government entity may not spend more in one year on a program funded with the proceeds of taxes than it did in the prior year."[33] Articles XIII A and XIII B work in tandem, restricting California governments' power both to levy and to spend for public purposes. Their goals are to "protect residents from excessive taxation and government spending."[34]

Article XIII B, section 6 requires, with exceptions not relevant to this issue, that whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds to reimburse the local government for the costs of the new program or higher level of service. In *County of San Diego v. Commission on State Mandates*,[35] the Supreme Court explained that section 6 represents a recognition that together articles XIII A and XIII B severely restrict the taxing and spending powers of local agencies. The purpose of section 6 is to preclude the state from shifting financial responsibility for governmental functions to local agencies, which are ill equipped to undertake increased financial responsibilities *because they are subject to taxing and spending limitations under articles XIII A and XIII B.*[36]

Thus, a local agency must be subject to the tax and spend limitations of articles XIII A and XIII B to be eligible for reimbursement of costs incurred to implement a "program" under section 6.

In the present case, COGs are joint powers agencies established pursuant to the Joint Exercise of Powers Act (Gov. Code, § 6500 et seq.). They are made up of cities and counties that voluntarily become members of the joint power authority. Under the Act, local agencies are authorized to enter into agreements to "jointly exercise any power common to the contracting parties."[37] The

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[31] *County of Fresno v. State of California* (1991) 53 Cal.3d 482,487; *County of San Diego, supra,* 15 Cal.4th 68, 81.

[32] *County of San Diego, supra,* 15 Cal.4th at page 81.

[33] *Huntington Park Redevelopment Agency v. Martin* (1985) 38 Cal.3d 100, 107.

[34] *Ibid.*

[35] *County of San Diego, supra,* 15 Cal. 4th at page 81.

[36] *Ibid; See also, Redevelopment Agency of the City of San Marcos v. Commission on State Mandates* (1997) 55 Cal.App.4th 976, 980-981, 985; and *City of El Monte v. Commission on State Mandates* (2000) 83 Cal.App.4th 266, 280-281.

[37] Government Code section 6502.

entity provided to administer or execute the agreement may be one or more of the parties to the agreement; a person, firm or corporation, including a nonprofit corporation, designated in the agreement; or a public entity, commission or board.[38] A joint powers authority is a separate entity from the parties to the agreement and is not legally considered to be the same entity as its contracting parties.[39]

A joint powers agency, such as a COG in this case, has only the powers that are specified in the joint powers agreement.[40] Unlike one of their city or county members, COGs do not have the independent statutory authority to levy and to collect tax revenue. Rather, they receive funds through membership dues paid with the proceeds of taxes of their city and county members.[41]

In addition, as explained below, COGs are not subject to the spending limitation prescribed by article XIII B. Article XIII B, section 8, subdivision (b), defines "appropriations subject to limitation" for local government to mean "any authorization to expend during a fiscal year the *proceeds of taxes levied by or for that entity* and the proceeds of state subventions to that entity (other than subventions made pursuant to section 6) exclusive of refunds of taxes... ." [Emphasis added.] As indicated above, COGs do not have the independent power to tax. Thus, the issue is whether their local agency members, who do have the power to tax, can levy taxes "for" the COGs, making those tax proceeds subject to the spending limitation of article XIII B.

In 1985, the Second District Court of Appeal, in *Bell Community Redevelopment Agency v. Woosley*, interpreted the phrase "taxes levied by or for an entity" in the definition of "appropriations subject to limitation" in article XIII B, section 8.[42] Although the *Bell* case involved a redevelopment agency, the court's interpretation of the spending limit in article XIII B is instructive and relevant to this case.

The *Bell* court determined that the phrase "taxes levied by or for an entity" has a long-standing special meaning, dating back to an 1895 law that provided for the levy of taxes "by and for" municipal corporations. Based on the interpretation of the phrase, the court concluded that a local agency does not levy taxes for a redevelopment agency since a redevelopment agency does not have the power to tax. Thus, "costs" incurred by an entity that does not have the power to tax are not subject to the spending limit in article XIII B. The court's holding is as follows:

> This [1895] act allowed general law and charter cities to continue to exercise their taxing power directly or, if they so desired, to have the county levy and collect their taxes for them. [Citations omitted.] The legal effect of this arrangement, as explained by case law, was that the taxing power exercised was that of the city, and it remained in the city. The county officers in levying taxes for the city became ex-officio officers of the city and exercised the city's taxing power.

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[38] Government Code sections 6506, 6508.

[39] Government Code section 6507; 65 Opinions of the California Attorney General 618, 623 (1982).

[40] Government Code section 6508.

[41] See rebuttal comments of the Councils of Governments, page 9.

[42] *Bell Community Redevelopment Agency v. Woosley* (1985) 169 Cal.App.3d 24.

> [Citation omitted.] In levying taxes for the city the county was levying "municipal taxes" through the ordinary county machinery. [Citation omitted.]
>
> Thus, the salient characteristics of one entity levying taxes "for" another entity are: (1) the entity for whom the taxes are levied has the taxing power; (2) the levying officers of the county exercise the taxing power of the entity for whom they are levying; (3) they exercise such power as ex-officio officers of that entity, and (4) the taxes collected are those of the "levied for" entity." *It is obvious that none of these characteristics has any applicability to the redevelopment process … The first and foremost fact which mandates this conclusion is that a redevelopment agency does not have the power to tax. [Citation omitted.] That being the case, we resolve that the county is not levying taxes "for" the Agency*. (Emphasis added.)[43]

Similarly, a county or city member of a COG does not levy taxes for the COGs since they do not have the power to tax. Therefore, the "costs" incurred by COGs for this program are not subject to the tax and spend limitations of articles XIII A and XIII B. Accordingly, article XIII B, section 6 does not apply to COGs.

This conclusion is further supported by the Legislature's interpretation of article XIII B, section 6 in section 17500 et seq., which were established by the Legislature as the "sole and exclusive procedure by which a local agency or school district may claim reimbursement for costs mandated by the state" as required by article XIII B, section 6.[44] Thus, the definitions of eligible claimants in the Government Code are the statutes that are relevant to an analysis of eligible claimants under article XIII B, section 6, and not the definitions in the Revenue and Taxation Code as asserted by SCAG.

In this respect, CSAC asserts that COGs are eligible claimants based on the Legislature's definition of "local agency" in section 17518, which defines "local agency" to mean "any city, county, special district, authority, or other political subdivision of the state." Although the Legislature includes the word "authority" in the definition of local agency, it is not clear from the plain language of the statute what type of authority the Legislature intended to include within the definition. Since the language in section 17518 is not clear, the rules of statutory construction must be followed to determine legislative intent.

Under the rules of statutory construction, the courts will "seek to ascertain common characteristics among things of the same kind, class, or nature when they are cataloged in legislative enactments."[45] The California Supreme Court explained the rule as follows:

> The principle requires that when we interpret general statutory terms following the listing of specific classes of persons or things, we must construe the terms as applying to persons or things of the same general nature or class as those listed. The rule is based on the obvious reason that if the writer had intended the general words to be used in their unrestricted sense, he or she would not have mentioned

[43] *Id.* at pages 32-33.

[44] Government Code section 17552.

[45] *White v. Ultramar, Inc*. (1999) 21 Cal.4th 563, 573.

> the particular things or classes of things which would in that event become mere surplusage.[46]

In the present case, the Legislature placed the word "authority" next to the words "city, county, and special district" when defining eligible claimants for purposes of reimbursement under article XIII B, section 6. Thus, under the rule of statutory construction described above, it is presumed that the Legislature intended that an "authority" would be of the same general nature or class as a city, county or special district. Cities, counties, and special districts have the power to tax[47] and are subject to the spending limitation of article XIII B and, thus, are eligible claimants under article XIII B, section 6. Joint powers authorities, such as COGs, do not have the power to tax and are not subject to the spending limitation in article XIII B. Thus, joint powers authorities are not in the same class as a city, county, or special district for purposes of reimbursement under article XIII B, section 6.

Moreover, prior to 2004, the Legislature, in section 17520, specifically defined a "special district" that was eligible to claim reimbursement under article XIII B, section 6 to include a joint powers agency and a redevelopment agency. In 2004, the Legislature amended section 17520 to *delete* joint power agencies and redevelopment agencies from the definition of special district.[48] It is a fundamental rule of statutory construction that "the Legislature is deemed to be aware of … judicial decisions already in existence, and to have enacted or amended a statute in light thereof."[49] In addition, it is presumed the Legislature intends to change the meaning of a law when it alters the statutory language by deleting express provisions of the statute.[50]

In the present case, two decisions by the courts of appeal were published before the Legislature amended section 17520, concluding that redevelopment agencies are not subject to article XIII B, section 6 since they not bound by the spending limitations in article XIII B, and are not required to expend any proceeds of taxes.[51] As stated above, it is presumed that the Legislature was aware of these court decisions and deleted from the definition of "special district" the entities that were not subject to the tax and spend provisions of article XIII A and XIII B, i.e., redevelopment agencies and joint power agencies.

Thus, the deletion of joint power agencies from the definition of special districts in section 17520 supports the conclusion that the Legislature did not intend that the word "authority" in section 17518 included an authority, such as a COG, that does not have power to tax and is not subject to the spending limitations in article XIII B. Statutes must be construed in the context of the entire

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[46] *Ibid*.

[47] Revenue and Taxation Code sections 93, 95.

[48] Statutes 2004, chapter 890 (Assem. Bill No. 2856).

[49] *People v. Harrison* (1989) 48 Cal.3d 321, 329.

[50] *People v. Mendoza* (2000) 23 Cal.4th 896, 916.

[51] *Redevelopment Agency, supra,* 55 Cal.App.4th at page 986. The Third District Court of Appeal adopted the reasoning of the *Redevelopment Agency* decision in *City of El Monte, supra,* 83 Cal.App.4th at page 281.

statutory scheme of which it is a part, in order to achieve harmony among its parts. It is not appropriate to confine interpretation to the one section to be construed.[52]

Therefore, staff finds that the "costs" incurred by COGs are not the type of costs that are reimbursable under article XIII B, section 6. Accordingly, COGs are not eligible claimants for purposes of mandate reimbursement under article XIII B, section 6 or section 17500 et seq.

Although this conclusion is sufficient grounds to deny the test claim, staff will also discuss the COG fee authority as a separate independent ground to deny the claim.

III. Does the test claim legislation impose "costs mandated by the state" on COGs within the meaning of article XIII B, section 6 of the California Constitution and section 17556 ?

Staff finds that, in addition to the COG eligibility issue discussed above, the fee authority of COGs is dispositive of the issues in this reconsideration. Therefore, there is no need to discuss whether the test claim statute constitutes a program within the meaning of article XIII B, section 6, or whether it is a new program or higher level of service.

In order for the test claim statute to impose a reimbursable state-mandated program under the California Constitution, two criteria must be met. First, the test claim legislation must impose costs mandated by the state.[53] Second, no statutory exceptions listed in section 17556 can apply. Section 17514 defines "cost mandated by the state" as follows:

> [A]ny increased costs which a local agency or school district is required to incur after July 1, 1980, as a result of any statute enacted on or after January 1, 1975, or any executive order implementing any statute enacted on or after January 1, 1975, which mandates a new program or higher level of service of an existing program within the meaning of Section 6 of Article XIII B of the California Constitution.

Section 17556, (as amended by Stats. 2004, ch. 895, Assem. Bill No. 2855), provides:

> The commission shall not find costs mandated by the state, as defined in Section 17514, in any claim submitted by a local agency or school district, if, after a hearing, the commission finds that:
>
> (a) The claim is submitted by a local agency or school district that requested legislative authority for that local agency or school district to implement the program specified in the statute, and that statute imposes costs upon that local agency or school district requesting the legislative authority. A resolution from the governing body or a letter from a delegated representative of the governing body of a local agency or school district that requests authorization for that local agency or school district to implement a given program shall constitute a request within the meaning of this paragraph.
>
> (b) The statute or executive order affirmed for the state a mandate that had been declared existing law or regulation by action of the courts.

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[52] *Peltier v. McCloud River R.R. Co.* (1995) 34 Cal.App.4th 1809, 1816.

[53] *Lucia Mar, supra*, 44 Cal.3d 830, 835; Government Code section 17514.

(c) The statute or executive order imposes a requirement that is mandated by a federal law or regulation and results in costs mandated by the federal government, unless the statute or executive order mandates costs that exceed the mandate in that federal law or regulation. This subdivision applies regardless of whether the federal law or regulation was enacted or adopted prior to or after the date on which the state statute or executive order was enacted or issued.

(d) The local agency or school district has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service.

(e) The statute, executive order, or an appropriation in a Budget Act or other bill provides for offsetting savings to local agencies or school districts that result in no net costs to the local agencies or school districts, or includes additional revenue that was specifically intended to fund the costs of the state mandate in an amount sufficient to fund the cost of the state mandate.

(f) The statute or executive order imposed duties that were expressly included in a ballot measure approved by the voters in a statewide or local election.

(g) The statute created a new crime or infraction, eliminated a crime or infraction, or changed the penalty for a crime or infraction, but only for that portion of the statute relating directly to the enforcement of the crime or infraction. [Emphasis added.]

The issue, therefore, is whether COGs, even if deemed a "local agency," have the authority in subdivision (d) of section 17556, "to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service."

DOF argues that COGs have fee authority under section 65584.1 and therefore the Commission cannot find there are costs mandated by the state.

Senator Ducheny also states that the Legislature provided fee authority to COGs in section 65584.1 for the activities in the test claim statute, "and for local governments to in turn to pass these costs on to developers as fees." According to the Senator, this fee authority was intended to meet the requirement in section 17556, subdivision (d), concluding that while there is a mandate on COGs "to perform the distribution of the regional housing need," it is not a reimbursable mandate.

CACOG argues that applying the fee authority would violate the state and federal constitutional provision against impairment of contracts because the joint powers agreements between COGs and member cities/counties are contracts that contain the only terms for amending them. CACOG reiterates the LCC's position that a COG fee on a local government that is not used for a local purpose, but for a statewide purpose, is actually a tax and therefore invalid.

SACOG concurs with and incorporates the CACOG's and LCC's comments, and asserts that section 65584.1 does not grant legitimate fee authority and does not exempt regional housing needs assessments from reimbursement. Because COGs have only the powers enumerated in their fee agreements with member agencies, COGs have no power to levy fees because member agencies would have to amend their joint powers agreements to grant COGs this authority. The fee authority, according to SACOG, is not real authority because it cannot be exercised until the member agencies authorize it. Moreover, SACOG points out that if the joint powers agreements

were amended to include a fee, some member agencies may withdraw from the COG, in which case the housing needs assessments would need to be conducted by the state. HCD may delegate this to the local agency if it has the resources and capability, and the local agency agrees to prepare the assessment. Under the new fee statute, COGs can only request that local agencies be subject to the new fee, and cities and counties likely do not have fee authority. According to SACOG, "Government Code section 65584.1 hinges on the hope that local agencies, and in turn, developers, will agree to pay the costs of the regional housing needs determination, despite the lack of genuine authority to levy such fees."

SCAG asserts that whether COGs may actually impose the fee in section 65584.1 is an unresolved issue, which until it is resolved, SCAG states is premature for the Commission to determine whether 65584.1 affects reimbursability of the regional housing needs assessment process. SCAG also states that the COG's authority to collect fees amounts to COGs collecting from themselves. SCAG asserts that until the issue of the validity of section 65584.1's fee authority is resolved, the fee constitutes an unconstitutional local tax.

In rebuttal comments by SCAG, AGAB, SACOG, CACOG and SANDAG, they repeat some of SCAG's arguments that COG fee authority amounts to COGs collecting it from themselves. They also argue that COGs have no authority to assess fees on their members unless their joint powers agreements empower them to, but that none of the agreements do. Thus, COGs have no authority to impose fees on their members without amending the agreements. And to force COGs to assess fee authority would unconstitutionally interfere with their agreements (Cal. Const., art. I, § 9). They argue that even if COGs have fee authority, the cities and counties cannot pass the fees onto developers because they do not have authority to levy fees to offset costs incurred by other agencies such as COGs. Rather, their fee authority only pertains to offset costs incurred by the city or county's own planning agency. Also, since the regional housing needs assessment does not provide a direct benefit to developers, the reasonable cost of providing the service would be difficult or impossible to determine.

LCC asserts that section 65584.1 provides neither the COGs nor cities and counties with valid authority to impose fees for the distribution of regional housing needs. LCC states that COG fee authority "unconstitutionally interferes with the organic structure of these councils of governments." Because COGs exist pursuant to a joint powers agreement between them and their cities and counties, LCC argues that the fee authority statute violates the state constitution when the agreement does not authorize the imposition of fees. LCC states that assuming there is COG fee authority, section 65584.1 purports to authorize the city or county to impose a fee on developers to reimburse itself for the COG fee. Section 65584.1 requires the fee to be imposed pursuant to section 66106, which limits the fee to the estimated cost of providing the service. However, the city or county is not providing the service to the developer, nor did the city or county incur costs to distribute regional housing needs. Since the COG provided the service and incurred the cost, LCC argues that the pass through fee is a tax that requires voter approval.

CBIA presents various arguments against the fee authority in section 65584.1. CBIA argues that allowing costs of state-mandated regional planning to promote housing to be passed onto cities and counties, and from there to homebuilders, would further exacerbate the difficulties of providing affordable housing. CBIA argues that section 65584.1 does not provide authority for COGs to pass on their state-mandated costs to homebuilders or homebuyers by way of city or county fees. According to CBIA, COGs that use section 65584.1 would impair or interfere with

their joint powers agreements in violation of article I, section 9 (the contracts clause) of the California constitution. CBIA also argues that even if a COG implemented this new fee authority, the statute provides no guidance on how it could be lawfully implemented.

CBIA asserts that the fee statute does not provide a valid basis for cities and counties to pass through costs they may incur for the support of the housing needs work performed by the COGs, and would not provide a basis for a valid fee for several reasons. First, there is no basis for seeking reimbursement of costs incurred by other agencies. City/county fee authority is limited to the reasonable costs imposed on the city or county. There is no authority "to impose fees on private property owners or developers to 'reimburse' costs incurred by others." Second, article XIII D of the California Constitution prohibits imposing a fee for general governmental services (art. XIII D, § 6, subd. (b)(5)). The fee prohibition applies to services available to the public at large in substantially the same manner as property owners. Because the service provided by COGs in distributing regional housing needs is available to the community on an equal basis, and "regional housing is a matter of statewide concern," charging a fee for it is constitutionally prohibited. Also prohibited is a fee on property owners unless the service is actually used by, or immediately available to them (art. XIII D, § 6, subd. (b)(4)). The fee cannot be based on potential or future use of a service. Thus, any city/county fee for housing elements would actually be a tax requiring voter approval. Third, the fee authorized by section 65584.1 would not meet the criteria for the two types of fees recognized by the California Supreme Court: development and regulatory fees. A development fee is defined "for the purpose of defraying all or a portion of the cost of public facilities related to the development project." (Gov. Code, § 66000, subd. (b)). The planning costs in section 65584.1's fee do not defray costs of public facilities, nor do they defray impacts caused by particular development projects, as required by law, and therefore do not constitute a lawful development fee. Since housing element activities are incurred independent of any particular development project, regardless of the level of development, and even in its absence, development fees imposed for housing element activities would be unlawful. Regulatory fees, according to CBIA, would also not apply to this case because they cannot exceed the reasonable cost of providing the service or regulatory activity for which they are charged, and they cannot be levied for general revenue purposes. CBIA argues that there is no regulatory function for this fee, as COGs have no role regulating individual housing development projects. Rather, the intent is to raise revenue to free the state from reimbursing the state-mandated program.

Finally, CBIA argues that conditions on development not related to the use of the property, but to shift the burden of providing the costs of a public benefit to another not responsible or only remotely or speculatively benefiting from it, is an unreasonable exercise of the police power, according to case law cited by CBIA. It also asserts that there must be a reasonable nexus between development activity and exactions imposed as a condition of that activity.

Staff finds that the test claim legislation does not impose "costs mandated by the state" on COGs because they have fee authority in section 65584.1.

Section 65684.1 (added by Stats. 2004, ch. 227, Sen. Bill No. 1102, and amended by Stats. 2004, ch. 818, Sen. Bill No. 1777) states:

> Councils of government may charge a fee to local governments to cover the projected reasonable, actual costs of the council in distributing regional housing

> needs pursuant to this article. Any fee shall not exceed the estimated amount required to implement its obligations pursuant to Section 65584. A city, county, or city and county may charge a fee, not to exceed the amount charged in the aggregate to the city, county, or city and county by the council of governments, to reimburse it for the cost of the fee charged by the council of government to cover the council's actual costs in distributing regional housing needs. The legislative body of the city, county, or city and county shall impose the fee pursuant to Section 66016, except that if the fee creates revenue in excess of actual costs, those revenues shall be refunded to the payers of the fee.

This fee authority is plenary authorization to charge fees for services. The only limitation on the COG fee is that it "not exceed the estimated amount required to implement its obligations pursuant to Section 65584."

In *Connell v. Superior Court of Sacramento County,*[54] the court considered whether regulations that increased the purity of recycled water was a reimbursable mandate. The *Connell* court found the fee authority is a question of law, so the evidence submitted regarding the fee's economic feasibility or sufficiency was not relevant.[55] The water districts' possession of the fee authority was dispositive of the question of the existence of a reimbursable mandate. The court rejected the districts' arguments that the fee would not be "sufficient to pay for the mandated costs" because it is unfeasible or economically undesirable for the districts to recover their costs.[56] As the *Connell* court stated:

> On appeal, appellants argue the sole inquiry is whether the local agency has "authority" to levy fees sufficient to pay the costs, and it does not matter whether the local agency, for economic reasons, finds it undesirable to exercise that authority. … [¶] … [¶] We agree with appellants."[57]

The *Connell* court first explained the purpose of subvention. As the California Supreme Court stated regarding article XIII B, section 6 of the California Constitution, "Section 6 requires subvention only when the costs in question can be recovered solely from tax revenues."[58] In upholding the constitutionality of the fee authority provision in section 17556, the Supreme Court stated that it "effectively construes the term 'costs' in the constitutional provision as excluding expenses that are recoverable from sources other than taxes. Such a construction is altogether sound."[59]

The *Connell* court went on to interpret the plain meaning of section 17556, subdivision (d)'s fee authority as the "right to exercise powers," or the "power or right to give commands [or] take

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[54] *Connell v. Superior Court of Sacramento County* (1997) 59 Cal.App.4th 382.

[55] *Id* .at page 400.

[56] *Id.* at page 399.

[57] *Id.* at page 400.

[58] *Id.* at page 398, citing *County of Fresno v. State of California, supra,* 53 Cal.3d 482, 487.

[59] *Ibid.*

action …."[60] The court rejected interpreting the statute to mean "a practical ability in light of surrounding economic circumstances," stating that if that had been the legislative intent, the Legislature would have used the term "reasonable ability" in the statute rather than "authority."[61]

The *Connell* court also considered an argument that "fees levied by the districts 'cannot exceed the cost to the local agency to provide such service,' because such excessive fees would constitute a special tax."[62] The court stated that no one is suggesting the districts levy fees that exceed their costs.

Staff finds the reasoning of the *Connell* case applies to this test claim reconsideration. Section 65584.1's fee authority provision grants authority to COGs for the "council's actual cost in distributing regional housing needs." The only limitation on the COG fee is that it "not exceed the estimated amount required to implement its obligations pursuant to Section 65584."

In view of *Connell,* staff does not find convincing the various arguments regarding the sufficiency or the difficulty of the basis for the fee. These arguments are not relevant to the legal inquiry because the sole consideration is whether COGs have fee authority.[63]

Since staff finds that COGs possess this authority based on section 65584.1, COGs cannot be reimbursed for their activities in developing the regional housing needs analysis.

Conclusion

Staff finds that the test claim legislation (Stats. 1980, ch. 1143) does not impose "costs mandated by the state" on COGs within the meaning of article XIII B, section 6 of the California Constitution and section 17556, subdivision (d) because (1) COGs are not eligible claimants for purposes of mandate reimbursement under article XIII B, section 6; and (2) the test claim legislation does not impose "costs mandated by the state" on COGs within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17556 because of the COGs' fee authority found in Government Code section 65584.1.

Recommendation

Therefore, staff recommends that the Commission adopt this analysis and deny claim no. 3929 effective July 1, 2004.

[60] *Id.* at page 401.

[61] *Id.* at page 400-401.

[62] *Id.* at page 402.

[63] *Id.* at page 400.